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No. 90-1017

In The

Supreme Court of the United States

October Term, 1990

BASIN ELECTRIC POWER COOPERATIVE,
a North Dakota electric cooperative association,
Petitioner,

v.

CRUM & FORSTER MANAGERS CORPORATION OF NEW YORK d/b/a INTERNATIONAL INSURANCE COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENTS BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Despite the Petitioner Basin Electric Power Cooperative's (hereinafter "Basin") assertions otherwise, the questions presented here have been presented, briefed and argued and are the same arguments presented in Basin's appeal to the Eighth Circuit Court of Appeals.

Properly stated, the question presented is whether the Court of Appeals properly affirmed a summary judgment in favor of the Respondent, although for reasons other than those stated by the District Court, when the Court of Appeals' decision has adequate basis in the record and the arguments made by Petitioner are the same as those presented below.

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RESPONDENTS BRIEF IN OPPOSITION

STATEMENT OF THE CASE

A. The Parties

Midwest Processing Company (hereinafter "Midwest") is a company which operated a sunflower seed processing plant near Velva, North Dakota. Midwest and Basin Electric Power Cooperative (hereinafter "Basin") had entered into contractual agreements. To secure certain obligations under

those agreements, Continental Illinois National Bank & Trust Company of Chicago (hereinafter "Continental") issued a Letter of Credit in favor of Basin in the amount of $5,000,000. A condition of payment on the Letter of Credit was the filing of a Bankruptcy Petition by, or against, Midwest.

Crum & Forster afforded coverage to Basin under a non-profit organization liability policy of insurance.

B. The Policy of Insurance

Under the Policy of insurance, Crum & Forster agreed to pay on behalf of the insured's "Losses" arising out of the "Wrongful Acts" and Losses for which the entity would be required by law to indemnify individual insureds for any civil claim or claims.

"Entity" was defined as meaning only Basin.

"Insureds" was defined to mean Basin and any individual who is a director, officer, trustee, employee, volunteer or staff member of Basin.

"Wrongful act" was defined to mean any error or misstatement or misleading statement or act or omission or neglect or breach of duty by one or more of the individual insureds while acting in their capacity as an authorized agent of Basin.

"Loss" was defined to mean any amount which the insureds are legally obligated to pay or which Basin would be required, or permitted by law to pay as indemnity to the insureds, for any claim or claims made against them for wrongful acts.

The policy also contained certain exclusions. These exclusions included claims arising out of any one or more of

the following:

1. An insured gaining any personal profit or advantage to which they were not legally entitled;

2. The return by the insureds of any renumeration paid in fact to them if payment of such renumeration shall be held by the Courts to be in violation of law;...

3. Brought about or contributed by the dishonesty of the insureds, however, notwithstanding the foregoing, the insureds shall be protected under the terms of this policy as to any claims upon which suit is brought against them or reason of any alleged dishonesty on the part of the insureds, unless a judgment or other final adjudication thereof adverse to the insured shall establish the facts of active and deliberate dishonesty committed by the insureds with actual dishonest purpose and intent material to the cause of the action so adjudicated.

Throughout the course of this litigation, Crum & Forster's position has been that the policy did not afford coverage for Basin's claims, that there was no compensable loss, that the referenced exclusions operated to deny Basin any recovery of the monies which it refunded and the additional settlement payments nade by it, and that Basin would be unjustly enriched if allowed to collect the sums claimed from Crum & Forster.

C. Procedural History

This was an action for declaratory relief brought pursuant to 28 U.S.C. §2201.

The case actually began with Basin's filing of an involuntary Chapter 11 Bankruptcy Petition in March of 1984 against Midwest. Basin was the sole petitioning creditor named in that petition.

Midwest brought a Motion to Dismiss the Petition on the grounds of an insufficient number of petitioning creditors and, further, on the grounds that the Petition was filed in bad faith. The Bankruptcy Court denied that Motion.

Midwest appealed the decision of the Bankruptcy Court. The District Court reversed and the involuntary petition was dismissed when the District Court found the Petition had been filed in bad faith and was an attempt by Basin to improperly invoke the jurisdiction of the Bankruptcy Court to effect a contract dispute.

Basin then appealed to the Eighth Circuit Court of Appeals. The Eighth Circuit affirmed the District Court. *Basin Electric Power Cooperative v. Midwest Processing Company*, 769 F.2d 483 (8th Cir. 1985), cert. denied 474 U.S. 1083 (1985). In the meantime, Basin had collected on the $5,000,000 Letter of Credit issued to Midwest by Continental.

Continental brought suit against Basin seeking reimbursement of the money it had paid to Basin as a result of the Bankruptcy filing along with interest. The suit also sought punitive damages.

The merits of that case were not litigated as, in June of

1987, Basin chose to settle. At the time, Basin provided a copy of its counsel's recommendation for settlement to Crum & Forster. By the terms of the settlement, Basin refunded the $5,000,000 to its rightful owners, Continental and Midwest, along with interest in the amount of $1,423,308. In addition, Basin paid $476,692 in settlement of claims for attorney's fees and punitive damages among other things.

This declaratory judgment action was started in October of 1987 following Basin's demand for reimbursement from Crum & Forster for all settlement payments, including the refund of principal and interest.

In July of 1988, Crum & Forster made a Motion for Summary Judgment which was denied. After taking additional depositions to complete the record, Crum & Forster moved for partial summary judgment with respect to Basin's claim for the amount of principal and interest; $6,423,000. The District Court granted the Motion for Partial Summary Judgment and, on its own motion, went on to dismiss the remainder of Crum & Forster's claims which amounted to approximately $477,000.

Basin appealed the Summary Judgment to the Eighth Circuit Court of Appeals raising the same issues and arguments recited in its Petition for Writ of Certiorari to this Court. The Eighth Circuit affirmed the District Court.

SUMMARY OF THE ARGUMENT

This is not an appropriate case for review upon Writ of Certiorari because (1) Basin had a fair and reasonable opportunity to present evidence and legal arguments relating to all issues in this case below, (2) the decision of the Court of

Appeals does not conflict with any decision of this Court, any Federal Court of Appeals or any state court of last resort and, in fact, is consistent with the decisions of both this Court and the Circuit Courts of Appeals, and (3) this case presents issues narrow in scope and of no national significance.

This Court and the various Circuit Courts have consistently held that a Court of Appeals may affirm the grant of a summary judgment on a theory different from the District Court when the particular circumstances require and when the record is sufficient to support the decision.

Basin had a full, fair and reasonable opportunity to present and develop its facts, arguments and legal positions below, In fact, Basin has already presented the lower courts with all of the evidence which it claims it will produce if given another chance and has previously presented the arguments which it now makes in support of its Petition.

ARGUMENT

A. THE DECISION OF THE EIGHTH CIRCUIT COURT OF APPEALS AFFIRMING SUMMARY JUDGMENT IN FAVOR OF CRUM & FORSTER DOES NOT DIRECTLY CONFLICT WITH ANY DECISION OF THIS COURT, ANY FEDERAL COURT OF APPEALS, OR ANY STATE COURT OF LAST RESORT AND, IN FACT, IS CONSISTENT WITH THIS COURT'S PRIOR HOLDINGS.

Contrary to Basin's arguments, this Court and the various Circuits have consistently held that a Court of Appeals may affirm a summary judgment on a theory different from the District Court when the record is sufficient to support the Judgment.

Basin relies upon three decisions rendered by this Court in support of its Petition for Writ of Certiorari. Interestingly, each case provides support for a denial of its Petition for Writ of Certiorari.

Perhaps the most instructive is the case of *Hormel v. Helvering*, 312 U.S. 552 (1940). In *Hormel*, this Court rejected the arguments now advanced by Basin: That an appellate court may never pass on issues not addressed by the court below.

What distinguishes *Hormel*, and other cases relied upon by Basin, is that Basin did have a full, fair and reasonable opportunity to present and develop its facts, arguments and legal support for its stance in this case.

Application of the principals discussed in *Hormel* should result in denial of Basin's Petition. In its Petition, Basin cited only to a portion of this Court's explanation of the principal of law involved here. What Basin did not recite is the comments which begin at page 556 where this Court stated:

> "But those cases do not announce an inflexible practice as indeed they could not without doing violence to the statutes which give to the Circuit Courts of Appeals reviewing decisions of the Board of Tax Appeals the

> power to modify, reverse or remand decisions not in accordance with law as justice may require. There may always be exceptional cases or particular circumstances which will promote a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the Court or administrative agency below." *Id.* at 556 to 557 citing *Blair v. Oesterlein Machine Co.*, 275 U.S. 220, 225.

And the Court further explained that:

> "Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with that policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice." *Id.* at 557.

And as further explanation, this Court referenced various cases cited by the Appellant in *Hormel* noting:

> "These decisions and others like them while recognizing the desirability and existence of a general practice under which appellate courts confine themselves to the issues raised below, nevertheless do not lose sight of the fact that such appellate practice should not be applied when the obvious result would be a plain miscarriage of justice." *Id.* at 558.

In closing, the *Hormel* Court held "therefore to apply here the general principal of appellate practice for which Petitioner contends would result in permitting him to wholly escape payment of a tax which under the record before us he clearly owes. Thus viewed, this is exactly the type of case where application of the general practice would defeat rather than promote the ends of justice, and the Court below was right in its holding." *Id.* at 560.

Accepting Basin's contention and blindly applying a general proposition of law to this case would defeat, rather than promote, the ends of justice.

Basin next turns to the case of *Singleton v. Wulff*, 428 U.S. 106, (1975), an abortion case. In addressing an unrelated rule of law, the *Singleton* Court made a statement which is of particular significance when it stated that Courts should not slavishly follow "general rules." The *Singleton* Court emphasized, "like any general rule, however, this one should not be applied where its underlying justifications are absent." *Id.* at 114. Although the *Singleton* Court reversed to allow the

Appellant to present evidence, the case is so factually distinct from the one at bar as to render it unpersuasive. In *Singleton*, the Appellant filed only a pre-Answer Motion to Dismiss. No Answer was ever filed and no other pleading addressed the merits of the case. The only exchange of information which occurred between the parties were answers to certain Interrogatories. The Court found it significant that the Appellant "...had never been heard in any way on the merits of the case..." *Id.* at 150.

Nothing could be further from the facts in this case. Basin filed its Answer, a Counterclaim and Crum & Forster served a Reply to the Counterclaim. Numerous Interrogatories were served by Basin on Crum & Forster and by Crum & Forster on Basin. Motions to Compel Discovery were made and heard and Orders were issued. Thirteen depositions were taken and an initial Motion for Summary Judgment was made in April, 1988. Basin filed two responsive Briefs to that Motion alone. The Motion was denied. More depositions were taken to complete the factual record. A Motion for Partial Summary Judgment was reurged by Crum & Forster. The facts allegedly giving rise to Basin's claims were exhaustively detailed in the Briefs. A hearing was held and Summary Judgment was granted.

Basin appealed to the Eighth Circuit Court of Appeals. It again briefed and argued the issues of coverage, exclusions, discovery disputes, its conduct, and what it expected to prove if it could obtain a reversal. The facts upon which Basin alleged that its claims were based were once again precisely detailed in the Briefs. Basin specified facts it intended to prove should the summary judgment be reversed. Those are the same arguments it makes here. The Court of Appeals was not persuaded.

Now Basin seeks certiorari from the highest Court of our land claiming that a narrow issue of insurance coverage raises an issue of national importance, warranting this Court's consideration. It is simply not so.

Basin provides this Court with string cites to cases allegedly supporting its positions. Several warrant comment. Basin cites the case of *British Airways Board v. Port Authority of New York*, 558 F.2d 75 (2nd Cir. 1977). *British Airways Board* dealt with a case where the defendant below had attempted to raise a factual issue for the first time on appeal; not a legal argument.

Although relied upon by Basin, the case of *Rich v. United States Lines, Inc.*, 596 F.2d 541 (3rd Cir. 1979) clearly supports the position advanced Crum & Forster throughout this lengthy and expensive litigation. It firmly held "an appeals court may affirm the grant of a summary judgment on a theory different from that of the District Court when the parties have presented all available evidence." *Id.* at 551.

In this case, we have the advantage that Basin has outlined in its Petition, each and every fact it claims it would prove if given yet another opportunity to present evidence and argument. As will be shown in Section B of this Brief, Basin has already had the opportunity to present evidence and argument on all of those points to the District Court on two occasions and the Eighth Circuit on two occasions.

Proctor v. State Farm Mutual Automobile Insurance Company, 675 F.2d 308 (D.C. Cir. 1982) is cited by Basin in support of its request to be given yet another opportunity to rehash the issues of its conduct, the coverage, and the exclusions. In *Proctor*, the Court of Appeals, discussing *Singleton*, supra, stated:

> "Nonetheless, as the Court made clear, [t]he matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the Court of Appeals, to be exercised on the facts of individual cases. *Id.* at 121, 96 S.C. at 2877. *Singleton* announced no general rule, because the Court recognized that certainly there are circumstances in which a Federal Appellate Court is justified in resolving an issue not passed on below..." *Id.* at 326.

In the instant case, Basin not only had a fair opportunity to dispute Crum & Forster's claim that it had no obligation under the policy to pay Basin's claims, Basin made the issues of coverage, its conduct, exclusions and discovery disputes major parts of its presentation to both the District Court and the Eighth Circuit Court of Appeals.

Several other comments made by Basin are noteworthy. Basin does point out to the Court that it made a Motion to Supplement the Record to the Eighth Circuit at the time of appeal. Although Basin is correct when it states the Eighth Circuit did not rule on the Motion, it does not logically follow nor can we assume the Eighth Circuit did not review the "evidence" brought before it by Basin in its Motion to Supplement the Record.

Basin correctly anticipates Crum & Forster will assert Basin was not treated unfairly. By its very comment, Basin implies a recognition that it was, indeed, treated fairly. Basin suggests that it was restricted to "naked legal arguments." That is simply not true. Basin exhaustively and extensively presented facts regarding its conduct, the coverage, discovery disputes, and all exclusions under the policy. Basin merely wants another chance to argue the same issues to a different Court. It has tried and failed on all levels properly available. The arguments it now presents are the same as it has presented throughout this litigation.

In the underlying action Basin had numerous opportunities to present its evidence, arguments, and legal support in the Bankruptcy Court, in the District Court, in the Burleigh County State Court of North Dakota, in the Eighth Circuit Court of Appeals, and before this Court when it brought its Petition for Writ of Certiorari. In the present case, Basin has also tried and failed on all levels properly available to it. Basin was twice before the District Court presenting issues regarding its conduct, the coverage, discovery disputes and the exclusions and twice before the Eighth Circuit Court of Appeals on ititial appeal and on Petition for Rehearing.

After all this, Basin is still attempting to argue issues it has already presented, argued and briefed.

B. BASIN ELECTRIC HAS HAD A FULL, FAIR AND REASONABLE OPPORTUNITY TO PRESENT EVIDENCE, ARGUMENT AND LEGAL SUPPORT RELATING TO THE ISSUE OF COVERAGE IN THIS CASE.

Basin claims it should have another opportunity to prove coverage existed in this case and goes so far as to disclose how it will prove its claim if allowed. Central to Basin's argument is its assertion that it did not have the opportunity to present and develop these facts and arguments in the Courts below. Any such assertion is incorrect. Basin raised, developed, briefed and argued all five points it now raises in both the District Court and the Eighth Circuit Court of Appeals. The same arguments were made in its Briefs below.

First, Basin claims it will prove that the conduct of its employees and officers falls within the scope of coverage under Crum & Forster's policy. Basin has had full opportunity and did present the factual evidence regarding its officers' conduct which resulted in its receipt and refund of the $5,000,000. Depositions of the key employees were taken and the evidence was available to Basin in its arguments to the courts below. Nothing new is available to Basin. Evidence of the conduct of the parties has been presented below and any inference otherwise is correct.

Second, Basin claims it would prove coverage existed because it would show a "course of dealing" between Crum & Forster and Basin Electric. Again, Basin asserted the same argument in its Brief to the Eighth Circuit Court of Appeals. In its "course of dealing" argument, Basin attempts to bootstrap two employment cases to the coverage issue in this case. Basin has raised these very same arguments below and the Eighth Circuit rejected them. Also, it is noteworthy that the two employment cases cited did not even address an issue of coverage.

Third, Basin claims it will prove waiver on Crum & Forster's part as to any issue relating to coverage. This is at least Basin's fourth run at this issue. It was asserted,

developed, briefed and argued at all stages of the proceeding in the District Court as well as the Eighth Circuit Court of Appeals. Neither Court below was persuaded.

Fourth, Basin claims if given a chance, it will show that case law establishes coverage. This is again the fourth time Basin has made the argument relying upon the same case. Basin has so argued since June 3, 1988, when it filed its first Brief in opposition to the initial Summary Judgment Motion by Crum & Forster. The argument has been consistently rejected by the Courts below.

Fifth, Basin claims if given a chance, a discovery dispute will somehow magically transform this case into one in which no coverage exists to one where coverage does exist. Again, Basin has developed, briefed and argued the discovery issues initially on June 3, 1988, and in each and every Brief it has written thereafter. Neither of the Courts below have been persuaded.

Basin's attempts to convince this Court it has not had a full, fair and reasonable opportunity to present evidence and legal argument on each and every claim it makes for coverage cannot be sustained. A simple review of Basin's Briefs below reveals that it has already presented its "evidence" and legal arguments to the Courts below, which found them unpersuasive.

C. THIS CASE PRESENTS A NARROW ISSUE IN SCOPE AND ONE OF NO NATIONAL SIGNIFICANCE.

This case deals with the narrow issue of whether a particularized insurance policy designed for non-profit organizations provides coverage to an insured under specific facts. It does not by any stretch of the imagination involve a case of national magnitude.

Finally, at the close of Basin's Petition for Writ of Certiorari, it attempts to convince this Court that the Circuits are split on the issue involved. That is not the case. There is no justification for a grant of certiorari in this case and Basin's self invented conflict between the Circuits is without foundation.

The Circuit Courts have consistently followed the rule recited in *Hormel v. Helvering*, 313 U.S. 552 (1940) wherein this Court held that an Appellate Court may consider questions not pressed nor passed on below when the particualr circumstance and justice requires. *Id.* at 557. The Circuit Courts have also uniformly followed the rule recited in *Riley v. Commissioner of Internal Revenue*, 311 U.S. 55 (1940) wherein this Court held that where a decision below is correct "it must be affirmed by the Appellate Court though the lower court gave a wrong reason for its action." *Id.* at 59.

While the language adopted by each Circuit may not be precisely the same, the effect is. Despite Basin's attempts to convince this Court otherwise, the rule of law is consistent throughout the Circuits and in fact is consistent with the law set forth by the Supreme Court.

In *Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5 (1st Cir. 1990) a summary judgment for the employer in an employment discrimination suit was affirmed with the Court noting that "...In reviewing summary judgments as elsewhere, a Court of Appeals is not limited to the District Court's reasoning, but may affirm on any independently sufficient ground." *Id.* at 7.

Alfaro Motors, Inc. v. Ward, 814 F.2d 883 (2nd Cir. 1987) affirmed a summary judgment for the Defendant with the Court noting, "Although the District Court based its dismissal of the Complaint on other grounds, we are free to

affirm a District Court decision on any grounds for which there is a record sufficient to permit conclusions of law, even grounds not relied upon by the District Court." *Id.* at 887.

In *Johnson v. Orr*, 776 F.2d 75 (3rd Cir. 1985), the Court of Appeals affirmed a summary judgment for the plaintiff, but for different reasons than those enunciated by the District Court. The Court of Appeals noted, at footnote #7, page 83 that an Appellate Court may affirm a result reached by the District Court on reasons that differ so long as the record supports the judgment.

Bernhardt v. Richardson-Merrell, Inc., 892 F.2d 440 (5th Cir. 1990) affirmed a summary judgment for the defendant manufacturer in a products liability case with the Court noting that it may affirm a grant of summary judgment on grounds other than those stated by the trial court. *Id.* at 444.

Brown v. Southwestern Bell Telephone Co., 901 F.2d 1250 (5th Cir. 1990) affirmed a summary judgment in favor of the plaintiff with the Court noting that it may affirm a summary judgment on grounds other than those relied upon by the District Court when the Court finds in the record an adequate and independent basis for that result. *Id.* at 1255.

Russ-Kwik Car Wash, Inc. v. Marathon Petroleum Co., 772 F.2d 214 (6th Cir. 1985) affirmed a summary judgment in favor of the defendant with the Court noting, "A decision below must be affirmed if correct for any reason, including a reason not considered by the lower court. Citing *J.E. Riley Investment Co. v. Commissioner*, 311 U.S. 55 (1940).

Sally Beauty Co., Inc. v. Nexxus Products Co., Inc., 801 F.2d 1001 (7th Cir. 1986) wherein the Court affirmed a summary judgment for the defendant manufacturer noting, "We may

affirm this summary judgment, however, on a different ground if it finds support in the record." *Id.* at 1005.

Lane v. Peterson, 899 F.2d 737 (8th Cir. 1990) affirmed the dismissal of the plaintiff's claims noting that a judgment may be affirmed on any grounds supported by the record even if not relied upon by the District Court.

Stoetzel v. Continental Textile Corporation of America, 768 F.2d 217 (8th Cir. 1985) a summary judgment for an employer was affirmed with the Court noting that it may affirm on any grounds supported by the record even though that ground was not directly addressed (or addressed at all) in the court below." *Id.* at 222.

Catter v. Arkansas Louisiana Gas Co., 765 F.2d 730 (8th Cir. 1985) affirmed a dismissal of a Complaint noting that an Appellate Court may affirm on any grounds supported by the record, even though the ground was not directly addressed, or, in fact addressed at all in the court below. *Id.* at 735.

Fidelty Financial Corp. v. Federal Home Loan Bank of San Francisco, 792 F.2d 1432 (9th Cir. 1986) affirmed the dismissal of a Complaint noting that the Appellate Court may affirm a District Court on a ground not selected by the district judge so long as the record fairly supports an alternative disposition on the issue. *Id.* at 1437.

This Court has denied Petitions for Certiorari in cases involving the issue raised by Petitioner:

Chongris v. Board of Appeals, 811 F.2d 36 (1st Cir. 1987), cert. denied 483 U.S. 1021 (1987); *Railroad Labor Executives Association v. Stanton Island Railroad*, 792 F.2d 7 (2nd Cir. 1986) cert. denied 479 U.S. 1054 (1987); *Brown v. St. Louis*

Police Department, 691 F.2d 393 (8th Cir. 1982) cert. denied 461 U.S. 908 (1983); *Colorado Flying Academy, Inc. v. United States*, 724 F.2d 871, 880 (10th Cir. 1984) cert. denied 476 U.S. 1182 (1986); *Lindsey v. Dayton Hudson Corporation*, 592 F.2d 1118, 1124 cert. denied 444 U.S. 856 (1979).

Basin boldly states that it was deprived of its day in court. The facts are to the contrary. Basin is seeking yet another chance to present the same facts, the same law and the same arguments it has since October of 1987 when this action commenced. It continues to consume the judicial system in an attempt to recoup the reimbursement it made of monies to which it was not rightly entitled.

CONCLUSION

The record unequivocally establishes that Basin was allowed a fair, full, meaningful and reasonable opportunity to present evidence, argument and legal support regarding the issues deemed dispositive by the Eighth Circuit. Basin cannot claim surprise when a plain reading of its Petition for Writ of Certiorari reveals each and every issue, argument and legal authority presented therein is identical to those presented to the Eighth Circuit Court of Appeals in its prior Briefs.

Dated this 18th day of January, 1991.

Respectfully submitted,

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STATEMENT REQUIRED BY RULE 29.1

Crum & Forster Managers Corporation of New York d/b/a International Insurance Company has the following parent corporations: Xerox, Xerox Financial Corporation, and Crum & Forster Commercial Insurance. Crum & Forster Managers Corporation of New York d/b/a International Insurance Company has no subsidiaries which are not wholly owned.